

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STEVEN SALAITA,)
)
Plaintiff,)
)
v.) No. 15 CV 00924
)
CHRISTOPHER KENNEDY, CHAIRMAN)
OF THE BOARD OF TRUSTEES OF THE)
UNIVERSITY OF ILLINOIS, et al.,) Chicago, Illinois
) July 15, 2015
Defendants.) 9:10 a.m.

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE HARRY D. LEINENWEBER

APPEARANCES:

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1 (Proceedings heard in open court:)

2 THE CLERK: 15 C 924, Salaita versus Kennedy.

3 THE COURT: Good morning.

4 MR. SWAMINATHAN: Good morning, your Honor. Anand
5 Swaminathan and Gretchen Helfrich for the plaintiff.

6 MR. WILSON: Good morning, your Honor. Chris Wilson
7 and Keith Klein on behalf of the University of Illinois.

8 THE COURT: I gave you a week or so to work this out.
9 Did you?

10 MR. SWAMINATHAN: I wish I could report that we had,
11 your Honor. After the conference, we sent defendant an e-mail
12 immediately afterward saying, hey, although we filed the
13 motion and we were at impasse, we're willing to work with you
14 on any compromises that can be reached despite the motion. If
15 you have any proposals to narrow these requests that would
16 address your concerns, let us know.

17 We had previously made proposals that had been
18 rejected; hence the motion. We got a response on Monday
19 basically saying, hey, we're willing to talk to you, but we
20 didn't have any concrete proposals. I spoke with defendants
21 yesterday. We had no further proposals.

22 So with the exception of one of these where we did
23 some narrowing and may have made some movement toward an
24 agreement, we're before you on all of these requests.

25 THE COURT: Let me see if I get what you're after.

1 It's a contention, I believe, that the Board was pressured by
2 outsiders into denying him a position. And by your discovery,
3 you're attempting to determine whether this occurred. Is
4 that --

5 MR. WILSON: That's incorrect, your Honor.

6 THE COURT: Pardon?

7 MR. WILSON: That -- it's more complicated than that.

8 THE COURT: Why isn't he entitled to that
9 information?

10 MR. WILSON: He is entitled to that, and we're
11 producing that. We're going to produce anything related to
12 Steven Salaita, anything from outside donors, any other
13 materials.

14 What they want to do is prove a lot of negatives
15 or -- for example, No. 2, they're contending that this wasn't
16 the result of outside donors or the result of the Board's
17 concern for the University but actual animus against
18 Palestine; that the individual Board members, Patrick
19 Fitzgerald, Christopher Kennedy, Judge Holmes, didn't -- they
20 actually did this because they don't like Palestine and they
21 didn't like Professor Salaita's views about Palestine.

22 So they want us to produce any documents we can find
23 at the university from the Board of Trustees that mention the
24 word "Israel" or "Palestine" or its peoples. And we have told
25 them, we just think that's too broad. And we're concerned

1 about the burden this has placed on the university. And they
2 consistently have no concern for the burden on the university.

3 We're going to go through Skadden Arps e-mails of
4 Patrick Fitzgerald to determine whether he has any mention of
5 Israel or Palestine in there. It's going to cost thousands of
6 dollars to no end.

7 There's no basis for them to contend that the eight
8 individual board members who voted against Dr. Salaita did so
9 because of an animus against Palestine. They can take the
10 deposition of each of those board members who are highly
11 respected individuals across the state of Illinois, and they
12 can challenge them about whether or not this was based on
13 animus towards Palestine, but we think it's just too far a
14 bridge to make us go through an entire computer search.

15 For example, your Honor, if there's just a document
16 that Patrick Fitzgerald received that said, "Just got back
17 from Israel, great vacation," that's going to pop up. We have
18 to have a team of lawyers review it for privilege. And that's
19 going to occur dozens of times for each of these eight people.

20 And we think that's just a bridge too far. And
21 really what it appears to be is imposing litigation costs on
22 the university for each of these little rabbit holes.

23 We'll produce anything about Steven Salaita, anything
24 from donors, but we just think documents related to Israel or
25 Palestine to prove a potential bias is punitive.

1 MR. SWAMINATHAN: So let me address that because I
2 think what he's now saying is their concern is really about
3 the burden, it's not really as much about the relevance which
4 is correct because the bottom line is, this is a First
5 Amendment case.

6 It is a viewpoint discrimination case in which we
7 say, look, they -- he made statements critical of Israel and
8 as a result of those, he was fired. The university doesn't
9 dispute he was fired over those specific tweets. Okay. So
10 they clearly said it's the speech.

11 Now we have to understand, what was it about that
12 speech that was so problematic. And we believe -- and they
13 said publicly, we apply this to the relief standard, basically
14 we found his comments to be so uncivil that we decided to fire
15 this guy. So we think that's a highly subjective standard.

16 A lot of people in the community have agreed with
17 that: The Committee on Academic Freedom. Tenure at the
18 university has agreed with that. The American Association of
19 University Professors has agreed with that.

20 It's a highly problematic standard. It's highly
21 subjective and it's most problematic because it allows someone
22 to say, hey, if you say something critical of somebody we all
23 dislike, Idi Amin or this person or that person, it's not
24 really so uncivil or harsh. But if you say something that's
25 unpopular, it's particularly harsh and we may take action.

1 THE COURT: How can you narrow it down so they don't
2 have to --

3 MR. SWAMINATHAN: Well, we've offered to. And so
4 here is what we --

5 THE COURT: Okay. How have you offered to?

6 MR. SWAMINATHAN: What we've said is, okay, if you're
7 doing this -- first, we said you go ahead and do a search on
8 Israel and Palestine. They came back to us and said, hey,
9 that actually hits a substantial number of records.

10 Now that's surprising to us because let me just
11 address this. These are not individuals who work in Middle
12 East studies or work in some specific department. These are
13 board members of the university who like you and me are really
14 not -- there's no reason to think they're talking about Israel
15 or Palestine day in and day out so they're going to have a
16 thousand e-mails about Israel or Palestine.

17 If he's got five e-mails about a vacation that he
18 took, then he has five e-mails about a vacation. They can
19 review them and not include them.

20 We need to understand why is it so burdensome to do
21 this search and just check. If you come back to me and tell
22 me, it turns out for Patrick Fitzgerald or for this other
23 defendant it hits a thousand documents, then we're happy to
24 address that with you. And that's what we've said. But come
25 back to us and tell us what the concerns are.

1 And we are willing to work with you to narrow these
2 requests by dates, to put additional search terms in so
3 instead of just searching "Palestine," you search "Palestine"
4 and something, whatever it is. But we can come up with ways
5 to narrow the request.

6 But ultimately, the request is relevant. Tell us
7 that you have a specific reason to show that it is actually
8 burdensome, and we'll work with you. But they haven't done
9 that.

10 MR. WILSON: If I could, your Honor, we've offered to
11 produce everything and we will produce everything that
12 mentions Steven Salaita in any way.

13 Just to be clear, here's their contention: There's
14 not going to be anything in Steven Salaita's documents that
15 show an anti-Palestine bias. We want to go through all your
16 other e-mails that have nothing to do with Steven Salaita
17 because we think there might be something where Patrick
18 Fitzgerald or Chris Kennedy or Dr. Koritz or Karen Hasara, the
19 mayor of Springfield, have said something anti-Palestine. And
20 we want you to go through the entire university, all their
21 e-mails, Skadden Arps, Schiff Hardin & Waite, the Merchandise
22 Mart, and find those.

23 And we said, we will give you everything about
24 Salaita and is it really -- we proposed this to counsel. Do
25 you really think that if there's an anti-Palestine bias, it's

1 not going to show up in the Steven Salaita e-mails, the
2 biggest Palestine/Israel conflict that has come up in memory?
3 And they're going to not have it there but we're going to have
4 to go through all of these other hits?

5 Anything, somebody from the -- an Israeli professor
6 who sends something, that's going to be a hit. There are
7 dozens of, hundreds of ways that Israel and Palestine could
8 show up on these. And we submit --

9 THE COURT: You're -- let me see if I -- the request
10 is that each of the defendants search his or her e-mails to
11 determine whether or not they sent any e-mails out that
12 mentioned Palestine or Israel. Is that your request?

13 MR. SWAMINATHAN: Basically, yes, whether or not
14 there's going to be documents that show hey, I'm a strong
15 supporter of Israel, I'm a harsh critic of Palestine, either
16 way. And basically, if they show those things, that has an
17 impact on how they viewed and treated Steven Salaita.

18 Now, what I said to the defendants over and over,
19 tell me what you think is a reasonable way to do this in light
20 of what burdens you perceive.

21 And if they want to say to me, I talked to Patrick
22 Fitzgerald and he says, I don't have any communications back
23 and forth about Palestine. I just don't get e-mails about it,
24 and I don't e-mail back about it.

25 All they have to do is make reasonable search

1 efforts, come back to me and tell me, "My reasonable search
2 efforts show me that he doesn't have any documents."

3 If they talk to each of these individuals and say,
4 hey, I don't have anything on this, then that may be simply
5 where we end up.

6 I'm not telling him exactly how to do the search.
7 I'm just saying it is highly relevant if they had a bias
8 against this viewpoint because this is employment viewpoint
9 discrimination case. Do make reasonable efforts.

10 THE COURT: Do you think you're going to find some
11 smoking gun to say that --

12 MR. WILSON: And your Honor, you're exactly right
13 which is, this is predicated --

14 THE COURT: Well, except, I mean, you can search my
15 e-mail. I don't think I've ever mentioned Israel or Palestine
16 in any e-mail, not that I might not have a view one way or
17 another on it. But it just seems to me I wouldn't have many.

18 MR. WILSON: This is predicated, though, remember, on
19 them asking Patrick Fitzgerald at his deposition, "Do you
20 harbor a bias against Palestine," and him saying, "No." They
21 want materials to impeach him because he ostensibly lied under
22 oath.

23 THE COURT: What's wrong with that?

24 MR. WILSON: Well, I think it's -- the burden against
25 that tiny sliver of information that they I don't think could

1 get, we'd have to go through an incredibly burdensome process.

2 THE COURT: Not necessarily. All he's asking, what,
3 is Israel, Palestine, and Salaita, right?

4 MR. SWAMINATHAN: All I'm saying, yes, exactly.
5 Anything --

6 THE COURT: How many e-mails did Patrick Fitzgerald
7 or Chris Kennedy or whoever else --

8 MR. WILSON: But your Honor, we'll produce anything
9 about Salaita. This is where it doesn't mention Salaita.

10 THE COURT: But I can't -- I just wouldn't think
11 that, you know, that normally there would be very many. I
12 think he's right.

13 MR. WILSON: But what surprised us is when we pull
14 all these mailboxes and you just enter the term "Israel," you
15 get a lot of hits. That's the problem.

16 THE COURT: With Patrick Fitzgerald?

17 MR. WILSON: No, with other people at the university.
18 We haven't done the Board yet.

19 THE COURT: So you're only asking for the defendants,
20 right?

21 MR. SWAMINATHAN: We're asking for the defendants.
22 We're asking for the defendants, the people who participated
23 in the decision making, so the defendants plus the two or
24 three, the chancellor or the administrators right next to her.
25 That's the relevant group of people who were the decision

1 makers.

2 THE COURT: That seems to me that shouldn't be that
3 burdensome. If it is --

4 MR. WILSON: We'll come back if it is.

5 THE COURT: All right.

6 MR. WILSON: My concern is, it is.

7 THE COURT: All right. I'll order you to do that.

8 And however, you have the right to ask me to reconsider if it
9 appears to be too burdensome. And I would suggest that maybe
10 you can work it out.

11 So what else is happening in the case?

12 MR. SWAMINATHAN: So that's Request No. 2. And there
13 are a number of additional requests. And let me just give you
14 sort of the, here are the categories that the requests fall
15 into where we're asking for additional information.

16 So we've covered one of them which are really
17 requests designed to get at this issue of, is there a -- why
18 did they pick Steven Salaita's speech as being the subject on
19 which they were going to take action against him as opposed to
20 all the others in the university faculty who say controversial
21 things all the time.

22 And it's relevant for two reasons. One is, it's
23 relevant to our First Amendment claim that they discriminated
24 against him based on his views and in particular his speech
25 and that it was his unpopular speech that caused problems,

1 unpopular speech that caused problems both because these
2 individuals didn't like it and they treated it as harsh
3 criticisms that they didn't like at a level that was different
4 in the way they treated other harsh criticisms that other
5 faculty made on other subjects and because they're more
6 willing to hear the views of donors and be influenced by those
7 views.

8 But here's the other reason it's also relevant,
9 because the university's defense in this case is that
10 Professor Salaita's case is sui generis and that because of
11 what he said and did, it was just so different, his criticisms
12 were so harsh and critical that they resulted -- they were
13 just too disruptive for the university to break them in.

14 And that's the university's claim since the
15 litigation is started which is a smart move. Instead of
16 saying it was civility, it's disruptive because that's the
17 Pickering defense. So they want to say, all right, under
18 Pickering, this is our defense, that it was disruptive. So
19 they've already made that very clear in their motion to
20 dismiss.

21 So we want to test that and say we don't think
22 anything that he said was particularly disruptive vis-a-vis
23 other people who said controversial things at the university.

24 So for example, we've asked them for information
25 about three specific individuals: A person who was a

1 professor at the university who was essentially a white
2 supremacist, a professor at the university who said things
3 that were harshly critical of homosexuals, and a professor who
4 was involved in an organization that's considered a terrorist
5 organization.

6 They say, I'm not producing any documents from any of
7 these people. We say it's highly relevant. If those people
8 said highly controversial things on different subjects, none
9 of them faced any kind of action or any kind of termination --

10 THE COURT: There's three individuals you're seeking?

11 MR. SWAMINATHAN: We're seeking three individuals.

12 THE COURT: What's -- shouldn't they be allowed to
13 determine if there's comparables who were treated differently?

14 MR. WILSON: Well, the comparable would be someone
15 who was subject to Board approval. They're asking for
16 existing faculty. That's the problem. We didn't want this
17 person to become existing faculty and subject us to all the
18 problems we had with different faculty. We'll stipulate there
19 are other faculty who have been problematic.

20 I don't know what having to produce all the documents
21 of any communication relating to Professor Weisberg, Professor
22 Howell, or Dr. Kilgore would advance this. Those would be
23 trials within trials. We'd have to comb the university to
24 find documents relevant to Kilgore, Howell, and Weisberg.

25 THE COURT: As I understand his argument, that they

1 wouldn't be comparables because they weren't subject to Board
2 approval.

3 MR. SWAMINATHAN: So the idea of comparables is
4 really an employment discrimination kind of concept. This is
5 a different scenario. They're saying, "I can't bring this
6 person in. I can't have this person be part of the university
7 committee. This person is unfit to teach at my university
8 because these comments were sufficiently disruptive" maybe
9 because so many donors weighed in or students weighed in or
10 other things.

11 A comparable doesn't have to be a faculty member
12 versus non-faculty member. That is going to be relevant to
13 Professor Salaita's contract claims and promissory estoppel
14 claims, but they say this person is unfit to teach at this
15 university because of his speech. His speech did unique
16 things that other speeches didn't do.

17 It's not about comparables in the context of whether
18 you're a -- by title a faculty member or by title almost a
19 faculty member or by title an adjunct faculty member. The
20 question is just simply, is it disruptive? How does the
21 university treat disruption? It's going to try to defend this
22 case by saying, hey, his stuff was disruptive. Well, what is
23 actually disruptive?

24 A thousand people came out and sent e-mails to the
25 faculty -- or to the administration about Kilgore or the guy

1 who is a white supremacist, well, that certainly suggests that
2 Professor Salaita's speech isn't really all that disruptive.
3 It's not something that would prevent you from being able to
4 bring this person into the university. So that's the idea.
5 It's a little different in this context.

6 MR. WILSON: This is about discovery. Those are all
7 fine arguments. They're fully developed, and he can make
8 those about different professors and how they were treated
9 differently.

10 The question is, does the university have to bear the
11 burden of providing any document relating to those professors
12 and any public statement they made during the last, I think,
13 15 years is what you asked for and then you narrowed it to the
14 last five years.

15 This, this would result in trials within trials.
16 They can make their arguments. They can say --

17 THE COURT: Well, the thing is, a trial within a
18 trial, if we go to trial and I allow it in -- I mean, this is
19 discovery.

20 MR. WILSON: But your Honor, what would they gain
21 from additional documents about Professor Weisberg other than
22 to cause a burden on the university? They have their
23 argument.

24 MR. SWAMINATHAN: Let me explain that because here's
25 what will happen. They are going to stand in front of a jury

1 in this case, and they're going to say, "Professor Salaita's
2 case was sui generis. I got a thousand e-mails from students
3 complaining about this professor. I had tons of donors come
4 out and tell me they didn't like this guy's speech. It was so
5 disruptive that I had to get rid of this guy." That's their
6 defense under Pickering.

7 THE COURT: Well, they didn't get rid of him; they
8 didn't hire him. That's different.

9 MR. SWAMINATHAN: Right, but -- it's a First
10 Amendment thing. So I had to -- my only defense to a First
11 Amendment claim is, yes, I took action motivated by his speech
12 but it was sufficiently disruptive. That's what a First
13 Amendment claim is.

14 In the case of Weisberg, he says something
15 controversial, said, "I didn't take action based on his
16 speech."

17 THE COURT: You have evidence of what they said,
18 don't you?

19 MR. SWAMINATHAN: I have evidence of what those
20 individuals said.

21 THE COURT: Yes.

22 MR. SWAMINATHAN: Yes, but I want to know what is the
23 university's decision making about -- because I know what they
24 said. I don't know --

25 THE COURT: Well, you know they didn't fire him so

1 you can --

2 MR. SWAMINATHAN: But I don't know what the level of
3 disruption is for the university. So I don't know, for
4 example, did the chancellor get a thousand e-mails about this
5 guy? Was there picketing on campus that the chancellor had to
6 take into consideration when she decided whether it was
7 disruptive?

8 And here's the -- ultimately the point. I need to be
9 able to defend against that claim when they stand in front of
10 the jury and say, hey, this was sui generis. This is a unique
11 instance and there's no case like it. I need to be able to
12 point to these other cases, a --

13 THE COURT: You can. You got their public
14 statements.

15 MR. SWAMINATHAN: I only have their statement that
16 they said something controversial. But they're going to say,
17 Salaita resulted in a thousand e-mails to the chancellor.

18 THE COURT: Well --

19 MR. SWAMINATHAN: I don't know what these other
20 people received. And here's --

21 THE COURT: And I'm inclined to agree with them, that
22 this is a little too far afield. So I'll deny the motion in
23 that respect.

24 MR. SWAMINATHAN: Okay. So here are the other key
25 subjects. They have to do with our contract, claims for

1 contract and promissory estoppel. So the basic idea there is,
2 they contracted to bring this guy in back in 2013 for a year.

3 He's still teaching at his other university as a
4 tenured faculty member. And then ultimately right before he's
5 about to come on to campus, they say, "We're not completing
6 your appointment."

7 Now, the contract claim is based on the idea that, of
8 course, the final approval of the Board is really a
9 ministerial function. For the same reason that Professor
10 Salaita resigned from a tenured faculty position before coming
11 on to campus and was about to start on campus, so did 10 to 15
12 others who were resigning tenured faculty positions to come on
13 to the tenured faculty of the University of Illinois.

14 So the contract claim is very much -- and the
15 promissory estoppel claims are entirely about whether or not
16 Professor Salaita's reliance on the university's promises to
17 him -- the offer letter, the salary, all the commitments that
18 the university made to him -- that induced him and all the
19 other people in his same position to resign tenured positions,
20 get ready to come to the University of Illinois, prepare their
21 coursework of academics, their curriculum, and come on campus,
22 that that was a reasonable reliance on the promises that were
23 made to them, that was a reasonable reliance on the offer
24 letters that were provided. So that's the central issue on
25 the contract and promissory estoppel claim.

1 So what we've asked for are documents relevant to
2 those claims. So we've asked for a few things. And really
3 these are all things that are tied directly to arguments that
4 the defendants have made in their motion to dismiss.

5 So for example, the university says in its motion to
6 dismiss, well, he can't have a contract with the university
7 because the only people who can bind the university by
8 contract are the secretary of the board and the comptroller of
9 the board, I think it is.

10 And so any other contract that's signed by --
11 Salaita's offer letter and other documents were signed by the
12 dean of the college, well, that doesn't mean anything. Those
13 are powerless documents.

14 Well, we don't think that that's true. People sign
15 contracts all the time in the university community. And if
16 they're going to make that argument, I have to have the
17 opportunity to defend against that argument.

18 And so I'm simply saying, produce documents to me
19 just in the last five years where these individuals have said,
20 hey -- produce where people have entered into contracts and
21 bind the university other than the secretary and comptroller.
22 So that's the kind of contract claim request that we've made.

23 We said for a promissory estoppel claim, we need to
24 know, was it reasonable for Professor Salaita to have relied
25 on the promises of this job.

1 Well, 13 other people or 14 other people were in the
2 exact same position. They resigned tenured positions with the
3 understanding they were going to come on to this campus and
4 have a job.

5 So did they engage in the exact same kind of reliance
6 on the exact same kind of promises because if they did, that's
7 strong evidence that Professor Salaita's reliance was also
8 reasonable.

9 So that's another set of document requests that we've
10 made where we said, hey, give us the information that's going
11 to allow us to prove our contract and promissory estoppel
12 claims and, more importantly, defend against the arguments
13 you're going to make against those claims.

14 MR. WILSON: Your Honor, this is a great example of
15 the tactics that are being deployed against the university.
16 We have received requests for 16 different professors from all
17 different schools, school of engineering, school of --
18 different arts and sciences and said, we want to know
19 everything about those, all those other professors that were
20 approved the same day.

21 And we said, what could possibly be the relevance of
22 them.

23 They said, it gets to our promissory estoppel
24 argument.

25 We said, well, how about if we give you the offer

1 letters that they received and any letter they sent back
2 approving it, can we just pull those.

3 They said no, we want everything about those
4 professors, their history, their background that you had,
5 anything relating to the review.

6 It's just an incredible burden. We'll produce the
7 documents that have the offer letter for 16 people. We think
8 that's --

9 THE COURT: Why isn't that sufficient?

10 MR. SWAMINATHAN: First of all, they hadn't offered
11 that at the time of the motion. They're offering that now.
12 They're saying, I'll give you the offer letter.

13 MR. WILSON: I offered that yesterday.

14 MR. SWAMINATHAN: And here's -- and here's what we
15 said. We don't want anything from these individuals about
16 their scholarship, their academic credentials, any of those
17 things that would be part of their file.

18 Yes, we want the offer letter, and you don't have to
19 go back in time to the recruitment process of the individuals
20 before that.

21 But in addition to the offer letter just like in
22 Salaita's case, there's subsequent back and forth with the
23 university that says, okay, when is my start date, provide me
24 with the information about my salary and contract terms,
25 etcetera. That kind of correspondence that is very much the

1 kind of negotiation and creation of a contract kind of
2 communication that we should also have.

3 And that's what we've told them: Look, we're not
4 asking for this for everything about these individuals. We
5 made that abundantly clear to them. We just want
6 communications with these individuals that will show what were
7 the commitments that the university made to them and what were
8 their understandings and expectations.

9 THE COURT: Isn't that in the contract and in the
10 commitment?

11 MR. SWAMINATHAN: Well, there -- the offer letter
12 would be one. And again, this is one where I said to them,
13 tell me what's reasonable. If they come back to me and say
14 the only document in their file that shows anything about
15 communication, there's really only one communication back and
16 forth when they made they offer was the offer letter, then
17 that's all they have to produce.

18 We believe there's likely to be some additional
19 communications. Produce them. And if you don't -- and if
20 you're saying it's burdensome, tell me how you think -- tell
21 me what's reasonable. Tell me why it's burdensome, and I'll
22 work with you. They haven't offered to do that. Their
23 objection here is, blanket objections and I'm not doing it.

24 THE COURT: All right. They've now agreed to give
25 you the offer letters, so I'll leave it at that at the moment.

1 If that doesn't work, you can re-request it.

2 MR. SWAMINATHAN: If there are additional
3 communications subsequent to the offer letter like, here's the
4 follow-on letter that says here is the salary --

5 THE COURT: All right. Follow-up letters, follow-up
6 letters --

7 MR. WILSON: If we can just pull what we have about
8 offer letters back and forth, that's fine. It's just the
9 entire process --

10 THE COURT: All right.

11 MR. WILSON: -- or I'm moving to campus --

12 THE COURT: Limit it at this time to the offer
13 letters.

14 Anything else? Is that it?

15 MR. SWAMINATHAN: There are more, your Honor. So
16 there is -- so that was with regard to those individuals. And
17 there's a related request. So we have a request that says,
18 tell us about instances in which an individual was offered a
19 tenured faculty position at the university and was not
20 recommended for appointment by the chancellor.

21 In other words, just like, are there any other cases
22 like Salaita where you hire somebody, offer them the job, tell
23 them to come on campus --

24 THE COURT: You just want the name?

25 MR. SWAMINATHAN: We want documents for those

1 individuals. What they've told us is, we don't think that
2 there's going to be any of those. All I need is a response
3 that says, no such documents exist.

4 If they say -- all they have to do is make reasonable
5 search efforts. Go talk to these people and say, hey, any
6 time in the last five years, did you ever hire somebody, say
7 I'm going to bring them in for the job and then recommend to
8 the Board --

9 THE COURT: You're asking for the name of any
10 individual who was hired over the objection of the chancellor?

11 MR. SWAMINATHAN: We're saying two things. One is,
12 is there any instances where you offer the person a job and
13 the chancellor didn't recommend them to the Board, which is
14 what they committed to do for Professor Salaita. And we're
15 saying, are there any instances when the Board rejected that
16 when some --

17 THE COURT: In other words, you want evidence -- you
18 want instances where the Board and the chancellor disagreed?

19 MR. SWAMINATHAN: Instances when they did something
20 different than what they did in Salaita.

21 THE COURT: When they disagreed, when either the
22 Board -- when they hadn't hired them over their objection or
23 the Board rejected them over their -- his recommendation.

24 MR. WILSON: Correct. And your Honor, just so -- the
25 reason we were at loggerheads over this is that broad extra

1 ground which was they -- where the chancellor didn't make a
2 recommendation, there are all kinds of situations where
3 someone has been made an offer and then they decide not to
4 come, someone has been made an offer and they go to another
5 university; somebody, they decide not to make a recommendation
6 at an interim level.

7 We will give anything about -- and we've talked to
8 the board of trustees and said, are you aware of them.

9 THE COURT: All right. Produce instances where there
10 was a disagreement between the Board and the chancellor.
11 That's what he wants. Okay?

12 MR. WILSON: We'll get that.

13 MR. SWAMINATHAN: I'm just going through the rest of
14 these, your Honor.

15 THE COURT: Anything else?

16 MR. SWAMINATHAN: There are a few more,
17 unfortunately, your Honor. Okay. So there's one that
18 simply -- that says, so they have a sovereign immunity defense
19 in this case. So they say the Board is subject to sovereign
20 immunity. That's a subject that is the subject of discovery,
21 appropriately the subject of discovery.

22 What we've said is, one of the key factors on whether
23 or not sovereign immunity applies is whether or not, is the
24 extent to which there is really oversight over the individual
25 by the state.

1 THE COURT: Isn't that a legal issue?

2 MR. SWAMINATHAN: It's a legal issue on which -- it
3 is considered an issue on which fact discovery is appropriate
4 to determine what is the extent to which sovereign immunity
5 would apply in a given instance. And one of the relevant
6 factors is to what extent are you subject to oversight or
7 monitoring by the state.

8 So and that's -- those are standards that are set
9 forth in the Seventh Circuit and the Northern District --

10 THE COURT: Isn't that for the Court to determine?

11 MR. SWAMINATHAN: Based on relevant evidence as to
12 whether or not, in fact, there is any oversight or not in a
13 given organization or institution that's claiming a right to
14 sovereign immunity. So here we're asking for something very
15 simple.

16 THE COURT: In other words, you want them to say what
17 factors they believe --

18 MR. SWAMINATHAN: Not even that, something much
19 smaller. I'm just saying, hey, did -- the board of trustees
20 is the defendant. And they're the one claiming sovereign
21 immunity. I'm saying, does anybody oversee you as the board?
22 Is there any oversight from the state?

23 We know that by statute, a governor appoints the
24 board of trustee members, but does anything else happen? Does
25 he check in on you? Do you have to send him a report monthly?

1 Is there anything that involves oversight or monitoring by the
2 governor or anyone on his staff or just anyone over the board
3 of trustees? That's highly relevant to whether or not
4 sovereign immunity applies. And what they basically told me
5 in our meet and confers is, there's no documents like that.

6 So all that I'm saying is, say no such documents
7 exist. What they said is just, "I object. This is not
8 relevant and it's burdensome."

9 I'm simply saying if the answer is no such documents
10 exist, tell me no such documents exist. I'm entitled to the
11 answer, not just an objection.

12 MR. WILSON: Your Honor, it's very confusing what
13 they're asking for.

14 THE COURT: I'm confused --

15 MR. WILSON: The --

16 THE COURT: -- which maybe is not the issue.

17 MR. WILSON: The board of trustees is a creature of
18 statute created by the University of Illinois. It is a legal
19 question. They certainly can ask the board of trustees --

20 THE COURT: Yes, it seems to me it's a legal question
21 and you can argue that. And ultimately, it would be up to me
22 or whoever hears the case.

23 MR. SWAMINATHAN: And in order to make that
24 determination, you've got to have information about what is
25 the extent of oversight of this organization, what is the

1 extent to which they get money from the State versus other
2 entities. Those are all relevant considerations in your
3 decision. We have to be able to put that information in front
4 of you.

5 We're asking for something very simple, which is
6 simply tell me whether this reporting relationship exists or
7 not.

8 MR. WILSON: They're making a very unique argument,
9 which is the University of Illinois is not a creature of the
10 State of Illinois, it is not entitled to be treated as part of
11 the State of Illinois. And so in order to buttress that
12 unique claim, they're seeking extremely broad documents. And
13 it hasn't been limited in any way like this.

14 We could not figure out how to frame this with them.
15 I submit that the best way to do this is ask the Board of
16 Trustees including the past and current chair in their
17 depositions these kinds of questions, and they can go forward.

18 There aren't documents relating to this. But we
19 would have to comb through a lot of university information to
20 determine that we could say, there's nothing --

21 THE COURT: I'm going to deny that request. What
22 other ones do you have?

23 MR. SWAMINATHAN: Let's see. Did we talk about --
24 okay. So we have one that talks about the delegation of power
25 to enter into a contract. That's one that I raised before but

1 we didn't address.

2 What the university basically said is, Professor
3 Salaita has no contract with the University of Illinois
4 because the individuals who entered into that contract, the
5 dean of the college and others with the approval of the
6 chancellor, chancellor's office, didn't have the authority to
7 even enter into a contract with him.

8 That's their argument in their motion to dismiss. I
9 have to be able to defend against that argument. And so I'm
10 saying, tell us about instances when people entered into
11 contracts other than the secretary and the comptroller who you
12 say are the only two people who can bind the university
13 because I have no doubt that there are others who can do that.

14 Now, I've offered to -- they say, I can't go across
15 the entire university and find every time somebody entered
16 into a construction project, construction contract or this or
17 that contract.

18 I said, start with the secretary and comptroller and
19 work down from there. Just start with a few people and give
20 me some feedback, give me some answers on this, and we'll work
21 with you. But what I've been told is, not relevant, too
22 burdensome, can't produce anything.

23 MR. WILSON: Your Honor, this is a question of law as
24 to whether or not a contract was formed. It's specific as to
25 Steven Salaita. Whether or not --

1 THE COURT: I agree. I'll deny that request.

2 Anything else?

3 MR. SWAMINATHAN: Yes, let me just check, your Honor.

4 We have a motion to compel interrogatory responses.

5 THE COURT: Are they similar issues?

6 MR. SWAMINATHAN: They are similar.

7 THE COURT: Then the ruling would be the same.

8 MR. SWAMINATHAN: Well, let me just -- if they are
9 the same types of issues, we can handle it that way.

10 So there is one that I think is related to your first
11 ruling granting our request in part. So interrogatory -- this
12 is as to Chancellor Wise. And what we've said to Chancellor
13 Wise is, is it your contention that Steven Salaita is
14 anti-Semitic or has made anti-Semitic remarks.

15 So what we've said is, for those specific Tweets that
16 you considered in making your decision that this is simply --
17 these are comments and speech that we think is too disruptive
18 or uncivil and so we're getting rid of you, did you view those
19 comments as anti-Semitic?

20 And what we basically -- just tell us whether or not
21 those instances you thought --

22 THE COURT: Wouldn't you be better off deposing him?

23 MR. SWAMINATHAN: Well, there's two things. One is,
24 this is a little bit of a bizarre objection because other
25 defendants have responded to this request and given us answers

1 as to whether or not they thought that what Professor Salaita
2 said was anti-Semitic or not.

3 So we would just like a similar response from
4 defendant Wise. I'm not sure why they've taken a different
5 position with regard to her.

6 MR. WILSON: If I could, your Honor, we have -- if
7 you could give me the interrogatory. The problem is that they
8 ask for as to each Tweet, each separate one, which one is
9 anti-Semitic and which one isn't. And there are a number of
10 them.

11 Here are some of the Tweets: "Zionist uplift in
12 America. Every little Jewish boy and girl can grow up to be
13 the leader of a murderous colonial regime."

14 THE COURT: Why don't --

15 MR. WILSON: "Zionist, transforming anti-Semitism
16 from something horrible into something honorable."

17 THE COURT: Why don't you take the deposition and if
18 you're unsatisfied, if you still need additional information,
19 then bring it back in front of me.

20 MR. SWAMINATHAN: Yes.

21 THE COURT: That seems to me that you're asking for,
22 you know, what their mental process was at the time they saw
23 these Tweets, I guess.

24 MR. SWAMINATHAN: We'll take the deposition, your
25 Honor.

1 THE COURT: All right. Take the depositions. And
2 I'll deny it without prejudice to re-raise it.

3 MR. SWAMINATHAN: We've asked another interrogatory
4 request that's pretty straightforward: Did you -- did you
5 personally in any way, degree, support, lobby, or urge the
6 decision of the committee on academic freedom.

7 So basically what happened there was a decision by
8 the committee on academic freedom and tenure within the
9 university. They did an investigation and they said, hey,
10 they violated Professor Salaita's rights of academic --

11 THE COURT: It seems to me you're better off asking
12 in a deposition. You're going to get a lawyer's response
13 rather than the --

14 MR. SWAMINATHAN: So -- yes. So here's the only
15 other one that I think we ought to consider because it's the
16 only one for which the answer might be different. We've asked
17 for them to identify other faculty members or candidates of
18 the faculty who made actual or alleged public remarks that you
19 consider racist, bigoted, sexist, inflammatory, profane,
20 vulgar, etcetera.

21 And the reason that request is different because
22 again, the relevance is like the ones we've talked about
23 earlier. We want to know about why did you treat his
24 inflammatory, controversial remarks differently than others.
25 And there were likely others that were racist like the white

1 supremacist and the others. There are other people who have
2 said things like that. But it's important for us to be able
3 to do discovery. I can't just do it by deposition because --
4 what I'm saying is just identify these other individuals so
5 that I can see if there's any appropriate discovery that I can
6 figure out.

7 Maybe as your Honor said, you have the statements.
8 Go see if you can figure out if it's disruptive or not
9 disruptive.

10 THE COURT: You just want a list of names?

11 MR. SWAMINATHAN: I want a list of the individuals.

12 MR. WILSON: Your Honor, I think this is something
13 better for a deposition, if she can recall people. Here's the
14 problem. This, all other faculty members or candidates to the
15 faculty who have made actual or alleged public remarks of
16 which you were aware since January 1st, 2005, that you
17 consider racist, bigoted, sexist, inflammatory, profane,
18 vulgar, or uncivil, for each faculty member, please state what
19 the remarks were, whether they were --

20 THE COURT: Okay. Yes, that's --

21 MR. SWAMINATHAN: Here's --

22 THE COURT: I'll let you get a list. I will make
23 them require the names but not what the remarks were.

24 MR. SWAMINATHAN: The only other part of that
25 request -- I appreciate that, your Honor. The other part of

1 that request was, were these remarks that were made, were
2 these comments that were made by the individuals something
3 that were made on campus or off campus.

4 THE COURT: I'll let you get the names of the
5 individuals, and then you can question them at the
6 deposition --

7 MR. SWAMINATHAN: Very good, your Honor.

8 THE COURT: -- as to what it was.

9 Okay. So the motion is granted in part and denied in
10 part. How is that?

11 MR. SWAMINATHAN: Thank you, your Honor.

12 THE COURT: All right. We need a further status.
13 When would you suggest?

14 MR. SWAMINATHAN: 30 days?

15 MR. WILSON: Sure, come back in a month.

16 THE COURT: 30 days.

17 THE CLERK: August 18th at 9:00.

18 MR. SWAMINATHAN: Thank you, your Honor.

19 ATTORNEY 3: Thank you, your Honor.

20 (Proceedings adjourned at 9:47 a.m.)
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C E R T I F I C A T E

I, Judith A. Walsh, do hereby certify that the foregoing is a complete, true, and accurate transcript of the proceedings had in the above-entitled case before the Honorable HARRY D. LEINENWEBER, one of the judges of said Court, at Chicago, Illinois, on July 15, 2015.

/s/ Judith A. Walsh, CSR, RDR, CRR July 21, 2015

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Northern District of Illinois

Eastern Division